Mohd Daud bin Mahmood v Suruhanjaya Perkhidmatan Awam Malaysia & Anor

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S2(S8)–21–152 OF 1996
KAMALANATHAN RATNAM J
29 AUGUST 2001

Administrative Law *— Rights and liabilities of public servants — Dismissal — Failure to give grounds for dismissal — Whether disciplinary board required to make finding of guilt*

Constitutional Law *— Public servants — Dismissal — Failure to hear mitigation upon punishment — Whether infringement of Federal Constitution art 135(2) — Public Officers (Conduct and Discipline) (Chap 'D') General Orders 1980 general order 23*

The plaintiff was at all material times the Assistant Cultural Officer of the Culture, Arts and Tourism Centre of Kelantan. The first defendant was at all material times the disciplinary authority of the plaintiff and was acting as the servant and/or agent of the second defendant, namely, the government of Malaysia. The plaintiff was informed by the first defendant that pursuant to O 26 of the Public Officers (Conduct and Discipline) (Chap 'D') General Orders 1980 ('the General Orders'), the first defendant had to take disciplinary action against the plaintiff with a view to dismissing him from service. The plaintiff then duly made his representations. The first defendant then informed the plaintiff that upon considering the plaintiff's case in its entirety, the first defendant had decided to dismiss him from service. The plaintiff contended, inter alia, that there has been an infringement of the provisions of art 135(2) of the Federal Constitution ('the Constitution') and O 23 of the General Orders in that the plaintiff was not given the opportunity to mitigate, the defendant did not give any grounds or reasons for the dismissal and that the plaintiff's dismissal was null and void and of no effect and therefore prayed for a declaration that the dismissal was wrong in law, an order that all arrears of salaries, etc, be calculated and paid to the plaintiff, and for damages, interest on the adjudged sum, costs and any further relief deemed fit and proper by the court. The defendants maintained that the dismissal was in order and prayed for the suit to be dismissed with costs.

Held, dismissing the suit with costs:

(1) The Federal Court had held that the General Orders, in detailing the procedures therein, had sufficiently complied with art 135(2) of the Constitution and, in the process, were in accord with the concept of natural justice and procedural fairness. There was certainly no separate right to make representations upon the punishment that ought to be meted out to the officer to be dismissed or reduced in rank. Therefore there was no injustice by the failure of the first defendant to hear the plaintiff's mitigation

separately (see p 756C–E); *Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v Utra Badi K Perumal* [2001] 2 MLJ 417 followed. In the circumstances, bound as the court was by this decision, it must find against the plaintiff on this ground (see p 756F).

(2) The case before the court was not one that was decided on appeal. There was no reason, therefore, for the defendants to give their reasons. In fact, as found by the Federal Court in *Utra Badi*, under general order 26(4), the disciplinary board was not even required to make a finding of guilt. The board was only required to decide whether the plaintiff's explanation had exculpated him to the satisfaction of the board (see p 757C–E); *Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v Utra Badi K Perumal* [2001] 2 MLJ 417 and *Hajah Halimatussaadiah bte Haji Kamaruddin v Public Services Commission, Malaysia & Anor* [1994] 3 MLJ 61 followed. In any case, so long as there was no requirement to even make a finding of guilt, there was therefore no requirement to give reasons (see p 757F); *Selvaraju a/l Ponniah v Suruhanjaya Perkhidmatan Awam, Malaysia & Anor* [1999] 5 MLJ 678 and *Minister of Human Resources & Ors v National Union of Hotel, Bar and Restaurant Workers, Semenanjung Malaysia and another appeal* [1997] 3 MLJ 377 followed.

[**Bahasa Malaysia summary**

Plaintif pada setiap masa matan adalah Pegawai Penolong Kebudayaan, Pusat Kebudayaan, Seni dan Pelancongan Kelantan. Defendan pertama pada setiap masa matan adalah pihak berkuasa tatatertib plaintif dan bertindak sebagai pekerja dan/atau ejen kepada defendan kedua, iaitu, kerajaan Malaysia. Plaintif telah dimaklumkan oleh defendan pertama bahawa menurut A 26 Peintah Am Pegawai-Pegawai Awam (Kelakuan dan Tatatertib) (Bab 'D') 1980 ('Perintah Am'), defendan pertama telah mengambil tindakan tatatertib terhadap plaintif dengan tujuan untuk memecat beliau daripada perkhidmatan. Plaintif kemudiannya telah membuat representasi beliau. Defendan pertama kemudiannya telah memaklumkan kepada plaintif bahawa setelah mempertimbangkan kes plaintif keseluruhannya, defendan pertama telah memutuskan untuk memecat beliau daripada perkhidmatan. Plaintif menghujahkan, antara lain, bahawa terdapat perlanggaran peruntukan-peruntukan perkara 135(2) Perlembagaan Persekutuan ('Perlembagaan') dan A 23 Perintah Am tersebut di mana plaintif tidak diberikan peluang untuk mitigasi, defendan tidak memberikan apa-apa alasan atau sebab untuk pemecatan tersebut dan pemecatan plaintif tersebut adalah batal dan tidak sah dan tidak berkuatkuasa dan oleh itu memohon untuk satu deklarasi bahawa pemecatan tersebut adalah salah di sisi undang-undang, satu perintah agar semua tunggakan gaji, dan lain-

lain, dikira dan dibayar kepada plaintif, dan untuk ganti rugi, faedah atas jumlah, kos yang diadili dan apa-apa relif lain yang difikirkan sesuai dan betul oleh mahkamah. Defendan-defendan telah mengekalkan bahawa pemecatan tersebut adalah betul dan memohon agar guaman tersebut ditolak dengan kos.

Diputuskan, menolak guaman tersebut dengan kos:

(1) Mahkamah Persekutuan telah memutuskan bahawa Perintah Am tersebut, di dalam mengamati prosedur di dalamnya, telah mematuhi secukupnya dengan perkara 135(2) Perlembagaan dan, dalam pada itu, telah menepati konsep keadilan asasi dan keadilan prosedur. Sememangnya tiada hak berasingan untuk membuat representasi terhadap hukuman yang sepatutnya dilaksanakan ke atas pegawai yang dipecat atau diturunkan pangkat. Oleh itu, tidak berlaku ketidakadilan dengan kegagalan defendan pertama untuk mendengar mitigasi plaintif secara berasingan (lihat ms 756C–E); *Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v Utra Badi K Perumal* [2001] 2 MLJ 417 diikut. Dalam keadaan ini, mahkamah terikat dengan keputusan ini, dan mesti berpihak terhadap plaintif atas alasan ini (lihat ms 756F).

(2) Kes di hadapan mahkamah bukan satu yang diputuskan atas rayuan. Tiada sebab, oleh itu, untuk defendan-defendan memberikan sebab-sebab mereka. Bahkan, sebagaimana yang diputuskan oleh Mahkamah Persekutuan dalam *Utra Badi*, di bawah perintah am 26(4), lembaga tatatertib tidakpun dikehendaki untuk membuat satu penemuan bersalah. Lembaga hanya dikehendaki untuk memutuskan sama ada penjelasan plaintif telah membebaskan beliau dan telah memuaskan hati lembaga tersebut (lihat ms 757C–E); *Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v Utra Badi K Perumal* [2001] 2 MLJ 417 dan *Hajah Halimatussaadiah bte Haji Kamaruddin v Public Services Commission, Malaysia & Anor* [1994] 3 MLJ 61 diikut. Dalam apa-apa keadaan, selagi tiada apa-apa keperluan untuk membuat satu penemuan bersalah, tiada akan terdapat keperluan untuk memberikan sebab (lihat ms 757F); *Selvaraju a/l Ponniah v Suruhanjaya Perkhidmatan Awam, Malaysia & Anor* [1999] 5 MLJ 678 dan *Minister of Human Resources & Ors v National Union of Hotel, Bar and Restaurant Workers, Semenanjung Malaysia and another appeal* [1997] 3 MLJ 377 diikut.]

Notes

For cases on dismissal of a public servant, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 519–543 and 3(1) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 1739–1748.

Cases referred to

Hajah Halimatussaadiah bte Haji Kamaruddin v Public Services Commission, Malaysia & Anor [1994] 3 MLJ 61 (folld)

Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v Utra Badi K Perumal [2000] 3 MLJ 281 (refd)

Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v Utra Badi K Perumal [2001] 2 MLJ 417 (folld)

Minister of Human Resources & Ors v National Union of Hotel, Bar and Restaurant Workers, Semenanjung Malaysia and another appeal [1997] 3 MLJ 377 (refd)

Rohana bte Ariffin & Anor v Universiti Sains Malaysia [1989] 1 MLJ 487 (refd)

Selvaraju a/l Ponniah v Suruhanjaya Perkhidmatan Awam, Malaysia & Anor [1999] 5 MLJ 678 (folld)

Utra Badi a/l K Perumal v Lembaga Tatatertib Perkhidmatan Awam & Anor [1998] 3 MLJ 676 (distd)

Legislation referred to

Federal Constitution art 135(2)

Public Officers (Conduct and Discipline) (Chap 'D') General Orders 1980 general orders 23, 26, (4), (5)

Karpal Singh (*Ramkarpal Singh* with him) (*Karpal Singh & Co*) for the plaintiff.

Ahmad Kamal bin Md Shahid (Attorney General's Chambers) for the defendants.

Kamalanathan Ratnam J:

Facts

The plaintiff was at all material times, the penolong pegawai kebudayaan attached to the Pusat Kebudayaan Kesenian dan Pelancongan, Wilayah Timur, Kota Bahru, Kelantan. The first defendant was at all material times the disciplinary authority of the plaintiff and was acting as the servant and/or agent of the second defendant. By a letter dated 22 March 1993, the plaintiff was informed by the first defendant that pursuant to general order 26 of the Public Officers (Conduct and Discipline) (Chap 'D') General Orders 1980 ('the General Orders'), the first defendant had decided to take disciplinary action against the plaintiff with a view to his dismissal from service. The plaintiff then duly made his representations by his letter dated 30 April 1993. By its letter dated 11 November 1993, the first defendant informed the plaintiff that at its meeting No 1748 held on 1 November 1993, where the plaintiff's case was considered in its entirety, the first defendant had decided to dismiss him forthwith, that is, as of 2 November 1993.

Case for the plaintiff

In its pleaded case, the plaintiff contended that his dismissal from service was null and void and of no effect on the following grounds:

(i) There has been infringement of the provisions of art 135(2) of the Federal Constitution and general order 23 of the General Orders in that the plaintiff was not given an opportunity to make a plea in mitigation after the decision to dismiss him was taken by the first defendant.

(ii) The first defendant did not give any reasons or grounds for its decision to dismiss the plaintiff, thereby infringing the rules of natural justice, and the decision making process in relation to the plaintiff's dismissal is therefore fatally flawed.

(iii) The first defendant's act in making the plaintiff's dismissal effective from 2 November 1993 is illegal and unlawful.

(iv) The plaintiff's dismissal is not on the authority of a valid or lawful power.

The plaintiff therefore prayed for:

(a) A declaration that the dismissal of the plaintiff from service by the first defendant at its meeting on 1 November 1993 with effect from 2 November 1993 is wrong in law, null and void, inoperative and of no consequence, and that the plaintiff is still an employee in the public service of the Federation.

(b) An order that an account be taken of all arrears of salaries, emoluments and other benefits due to the plaintiff, and that same be paid to him thereafter.

(c) Damages.

(d) Interest on the adjudged sum on such rates and for such periods deemed fit and proper by the court.

(e) Costs.

(f) Any further or other relief deemed fit and proper by the court.

Case for the defence

In their defence, the defendants averred that their letter dated 22 March 1999 also contained the charges against the plaintiff. Upon receiving the plaintiff's representation, the first defendant, having considered the charges and the plaintiff's representation, set up a Committee of Enquiry pursuant to general order 26(5) of the General Orders. The Committee of Enquiry investigated the matter, and on 29 September 1993, the plaintiff personally attended the said enquiry and gave evidence. The defendants maintained that the said dismissal was in order and prayed for the suit to be dismissed with costs.

Findings of the court

Each party called only one witness. Mr Karpal Singh for the plaintiff indicated during his submission that he was proceeding only on grounds (i) and (ii).

(i) No opportunity to mitigate

The plaintiff relied heavily on the decision of *Utra Badi a/l K Perumal v Lembaga Tatatertib Perkhidmatan Awam & Anor* [1998] 3 MLJ 676. The facts of this celebrated case which went through the portals of all three courts of this country are as follows. The plaintiff, a hospital attendant, was an employee of the second defendant. A sample of urine taken from him was tested positive for morphine. The first defendant requested the plaintiff to show cause why disciplinary action should not be taken against him on the ground that he was a drug addict. The charge was made under general order 26 of the General Orders, which contained two alternative punishments against him, namely to dismiss or to reduce in rank. The plaintiff gave his explanation on the charge proffered against him. The first defendant dismissed the plaintiff. The plaintiff's appeal to the appeal board was rejected. The plaintiff applied for a declaration that his purported dismissal was null and void. There were three issues before the court, ie that: (i) the wording in the show cause letter which contained two alternative punishments nullified the charge for want of clarity; (ii) the first defendant has taken into account other material information which had never been put to the plaintiff, and the plaintiff was not given a reasonable opportunity to be heard on the other relevant information that appeared to have been considered in the decision making process which led to his dismissal; (iii) that the first defendant has failed to give the plaintiff a reasonable opportunity to mitigate.

Vincent Ng J held that the right of the plaintiff to be heard in mitigation was encompassed in general order 23 of the General Orders and in art 135(2) of the Federal Constitution ('the Constitution'), and therefore it would be unjust to deny the civil servant an opportunity to be heard in mitigation before punishment is imposed on him, as the punishment itself involved a further decision making process. Holding that the plaintiff had been wrongly dismissed, the learned trial judge granted him the reliefs which he sought. The Court of Appeal (see *Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v Utra Badi K Perumal* [2000] 3 MLJ 281 (CA)), in dismissing the appeal, went on to hold that procedural fairness demanded not only the right in a public servant to make representations on the truth of the charges framed against him, but that it included the right, after a finding of guilt is made against him, to make representations on the question of punishment, and that he ought to have been given the opportunity to plead in mitigation before any punishment was meted out against him. This, the court held was in line with the provisions of general order 23 of the General Orders and further, such a reasoning harmonized with the provisions of art 135(2) of the Constitution. Having obtained leave, the respondent appealed to the Federal Court.

Since my decision would depend on the decision of the Federal Court, the parties, by consent, agreed that I defer my decision until the appeal on *Utra Badi* to the Federal Court was decided. The Federal Court granted leave for it to consider two questions arising from *Utra Badi*. They were (at p 421 of [2001] 2 MLJ 417 (FC)):

1 Whether a show cause letter issued by a Public Service Disciplinary Authority which directed a member of a public service's attention to the possibility of punishment of dismissal or reduction in rank sufficiently complied with the provisions of art 135(2) of the Federal Constitution that no member of a public service shall be dismissed or reduced in rank without being given a reasonable opportunity of being heard?; and

2 Does art 135(2) of the Federal Constitution require the relevant disciplinary to afford the public officer an oral hearing?

In a landmark decision, the Federal Court in *Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v Utra Badi K Perumal* [2001] 2 MLJ 417 allowed the appeal. In delivering the judgment of the court, Abdul Malek Ahmad FCJ very succinctly summarized the court's reasoning with these few lines at p 440:

> … we are of the view that the General Orders, in detailing the procedures therein, have sufficiently complied with art 135(2) of the Federal Constitution and, in the process, are in accord with the concept of natural justice and procedural fairness. As succinctly stated by the learned leading senior federal counsel in his submissions and as propounded in the long line of authorities considered, there is certainly no separate right to make representations upon the punishment that ought to be meted out to the officer to be dismissed or reduced in rank. In fact, under para (4) of general order 26 of the General Orders, the first appellant is not even required to make a finding of guilt which strongly indicate that there is only one hearing for a show cause letter issued under that general order. We therefore find that no injustice had been occasioned to the respondent by the failure to hear his mitigation separately.

The highest court of the country thus answered the first question in the affirmative. With regard to the second question, the court ventured the opinion that it may have fallen into error in granting leave on the second question. In any case, it answered the said question in the negative. In the circumstances, bound as I am by this decision, I must find against the plaintiff on this ground.

(ii) No reasons given for dismissal

The next complaint is that the first defendant did not give any reasons or grounds for its decision to dismiss the plaintiff, thereby infringing the rules of natural justice. It is not surprising that the plaintiff was unable to produce any single authority to substantiate this argument. The General Orders relating to dismissal do not provide for the first defendant to state its grounds for dismissal. Mr Karpal relied on *Rohana bte Ariffin & Anor v Universiti Sains Malaysia* [1989] 1 MLJ 487. In that case, the plaintiff and another applicant applied by way of certiorari to quash two separate decisions of the council of the respondent university which dismissed their appeals from the decision of the relevant disciplinary authority. The council, whilst confirming the finding of guilt recorded by the disciplinary authority against the applicant Rohana on the first charge of making a public statement on a matter that would be detrimental to the policies and decisions of the respondent university, however allowed her appeal against sentence by substituting, in place of the punishment, a warning and a

reduction of salary by two salary increments to last for one year from 1 February 1986, a warning and a reduction of salary by one increment for a period of one year from 21 February 1986 to 20 February 1987. It was argued in that case that no reasons were given for the decision arrived at. In respect of this argument, Edgar Joseph J (as he then was) had this to say at p 496:

> … I consider that if the requirement for reasons is essential for every quasi judicial order, then it would place administrative bodies in a very difficult position.
>
> But, having said that, I accept that there are certain cases where reasons for decision should be given particularly when there is a right of appeal, since an appeal is merely a continuation of proceedings by way of rehearing and litigants as well as the appellate tribunal are entitled to know the reasons for the finding.

The case before me is not one that was decided on appeal. There is no reason, therefore, for the defendants to give their reasons. In fact, as found by the Federal Court in *Utra Badi*, under general order 26(4) of the General Orders, the disciplinary board was not even required to make a finding of guilt. The Federal Court relied on the decision of the then Supreme Court in *Hajjah Halimatussaadiah bte Haji Kamaruddin v Public Services Commission, Malaysia & Anor* [1994] 3 MLJ 61, wherein Mohamed Dzaiddin SCJ (as the present Chief Justice then was) upheld the decision of Eusoff Chin J (as the Chief Justice then was) when he heard the said case at first instance, and decided that general order 26(4) of the General Orders did not require the Public Services Commission to make a finding of guilt before dismissing the plaintiff. He held that the Public Services Commission was only required to decide whether the plaintiff's explanation had exculpated her to the satisfaction of the Public Services Commission.

It would seem therefore that no reasons need be given. In any case, so long as there is no requirement to even make a finding of guilt, it is my judgment that there is therefore no requirement to give reasons. In fact, in *Selvaraju a/l Ponniah v Suruhanjaya Perkhidmatan Awam, Malaysia & Anor* [1999] 5 MLJ 678, Mr Karpal Singh raised the same argument and also relied on *Rohana bte Ariffin*. I dismissed this argument for the same reason, relying on the Court of Appeal's decision in *Minister of Human Resources & Ors v National Union of Hotel, Bar and Restaurant Workers, Semenanjung Malaysia and another appeal* [1997] 3 MLJ 377. In the circumstances, this suit is dismissed with costs.

Suit dismissed with costs.

Reported by Wong Ee Lynn